No. 22-5317
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANE DOE, A MINOR STUDENT,
BY AND THROUGH HER PARENTS, K.M. AND A.M.,

PLAINTIFFS-APPELLANTS.

VS.

KNOX COUNTY BOARD OF EDUCATION,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court for the
Eastern District of Tennessee
No. 3:22-cv-63
Hon. District Judge Crytzer

APPELLANT'S REPLY TO APPELLEE'S RESPONSE TO MOTION FOR INJUNCTIVE RELIEF AND/OR ACCELERATED HEARING

GILBERT LAW, PLC

Justin S. Gilbert (TN Bar 017079)

100 W. MLK Blvd, St 501
Chattanooga, TN 37402
Telephone: 423.756.8203
justin@schoolandworklaw.com

THE SALONUS FIRM, PLC

Jessica F. Salonus (Tn Bar 28158)

139 Stonebridge Boulevard
Jackson, TN 38305
Telephone: 731.300.0970
jsalonus@salonusfirm.com

I. THE IMPACT ON JANE DOE OF A "TEACHER CHOICE" RULE

Knox County's Response confirms the collision course between a student with Misophonia, Jane Doe, and a school, L&N STEM, that permits teachers to allow, or not allow, unlimited eating and drinking in the academic classrooms. Students ate Cheetos corn chips, breakfast in first period, and Panera Bread meals. (D.E. 30-1, K.M. Decl., at ¶4).

Importantly, L&N STEM is a public "Science, Technology, Engineering, and Math" school. It is not, say, a school for the culinary arts. Nothing about its curriculum involves food or gum. But as Knox County admits: "STEM chose to not ban food and drink in its classrooms (leaving that decision to individual teachers) …." (R. 21, Response, p. 3). That choice has a devastating effect on Jane Doe.

In one class alone, Doe fled 75% of the time. Across *all* the academic classes, she missed nearly half her education. (D.E. 27-2, Doe Decl., ¶¶6, 7). By the end of each day, she was so exhausted from the incessant eating and chewing that she could not engage in the normal activities of a teen. (*Id*. at ¶7). She experienced embarrassing facial twitches, and fleeing the classroom, which forced her outside of the school building in the elements when an empty classroom was unavailable. (D.E. 31-1, K.M. Decl, ¶¶3,4).

The "choice" permitted by Knox County at L&N STEM also resulted in foreseeable harassment by teenage boys. In the spring of 2022, they deliberately

targeted Jane Doe's disability by smacking their gum to trigger her on purpose. (*Id*. at ¶3). The family "begged" for the District Court to accept jurisdiction and enter an injunction for the well-being of their daughter. (*Id*. at ¶8).

II. "TEACHER CHOICE" OF STUDENTS EATING AND CHEWING GUM DO NOT TRUMP THE ADA

In its Response, Knox County attempts to *factually* justify a teacher-choice policy on eating and gum chewing. None of the suggestions is persuasive. First, in its "Summary of Facts," it contends that L&N STEM lacks a "dedicated cafeteria" such that *"academic classes [must] overlap lunch."* (R. 21, Response, p. 4) (citing RE 44-1, PageID#447). That is a mistruth that has nothing to do with IDEA administrative exhaustion.

As the principal acknowledges, there *are*, in fact, "two lunch periods." (*Id*.) During the lunch periods, students can, and do, eat in common areas or, as Jane Doe does, go outside to eat. (D.E. 48-1, Doe Decl, ¶7). Jane Doe is not skipping lunch, nor asking other students to skip lunch. None of Jane Doe's core academic classes require eating at the expense of *missing either of the two lunch periods.* (*Id*. at ¶¶7, 8).[1] And if *some* of the extra-curricular "clubs" lasting eighty minutes (Genius Hours) sometimes do extend into lunch, if Jane Doe wished to attend these, she could

[1] Jane Doe's Declaration refutes many other misstatements by the principal too. (See 48-1). But the District Court denied an evidentiary hearing.

excuse *herself* during the 15-20 minute overlap when students finish their lunches. (D.E. 27, Second Amended Complaint, ¶32).

Second, Knox County says STEM is a commuter school. (R. 21, Response, p. 4). It is. However, commuter students can snack, and do snack, *outside* of the academic classes, between classes, and during their allegedly lengthy commutes. They do not require *constant* food access. Jane Doe's accommodation of no eating or chewing gum in the *academic classes* is empirically workable at L&N STEM because (1) it is done in Math (where teacher requires students to spit out gum); and (2) it is done in the classes with expensive computer equipment (in order to protect the equipment). (D.E. 48-1, Doe Decl., ¶7). Surely, Jane Doe's health-related need for protection is equal to the Math teacher's desire to avoid distracting eating and chewing, and the school's need to safeguard expensive equipment.

Third, L&N STEM's principal claims that unlimited snacking helps students manage stress and decreases hunger. Obviously, comfort-eating to manage stress is a highly questionable practice for teens. But this is disingenuous too. It is rejected in the Math and the Computer classrooms. And Knox County rejects it *in every single other school* in its district. In any event, as shown above, Doe is not requesting an outright ban everywhere—just in her classrooms.

Fourth, Knox County exaggerates Jane Doe's disability to suggest an impossibility of accommodation. Specifically, it claims that "other" noises are

triggers too, and that she "often arrives to school late." (R. 21, Response, p. 6). This is just inaccurate. Jane Doe tersely responded that she has *"never been late to school due to migraines, in fact I usually arrive early."* (D.E. 48-1, Doe Decl., ¶3).[2]

In a similar vein, Knox County exaggerates the actual accommodation sought. Jane Doe does *not* seek to limit food to the cafeteria itself or even to "limit food consumption to lunch period…." (R. 21, Response, p. 5). She is simply asking the History teacher, for example, to have rules consistent with the Math and Computer teachers—"no eating in class and spit out your gum."[3]

Instead of modifying a clearly discretionary policy, Knox County says Jane Doe should *leave the entire school altogether*. "If Ms. Doe wishes to avoid [this harm] she could attend her zoned school, which does prohibit food in classrooms." (D.E. 21, Response, p. 23). Of course, Doe's zoned school does not offer the STEM focus she desires. Nor is it remotely comparable academically.[4] In fact, the "you

---

[2] Additionally, she has *not* left school due to migraines since October of 2021, when she entered a 17-day pain-rehabilitation program and learned coping skills for other sounds like typing. (*Id*. at ¶¶4, 6). She has not left a classroom because students were typing since that time. (*Id*. at ¶6.) In sum, the declarations of the principal and special education teacher in these areas amount to disability-blaming, as they "contain falsehoods or exaggerations that made [Doe] very angry." (*Id*. at ¶2).

[3] Knox County references her middle school "Safety Plan" lacking a provision banning gum chewing and eating. (R. 21, Response, p. 6). But that is because such bans *already* exist—just like every other Knox County school.

[4] *U.S. News and World Reports* ranks L&N 8th among all Tennessee high schools, while her zoned school, Fulton High School, is ranked 232. U.S. News and

can leave" suggestion itself violates the ADA's prohibition against "overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities." 42 U.S.C. §12101(a)(5) (emphasis added).

III. A 504 *ACCOMODATION* DELIVERS THE "RELIEF FROM HARM," NOT SPECIALLY DESIGNED INSTRUCTION UNDER IDEA

Turning to the actual matter of IDEA exhaustion, Knox County claims Jane Doe needs an IEP—which it has never offered before, nor even *considered.* In fact, prior to the District Court raising exhaustion, Knox County never argued it. Nonetheless, Knox County cites the *Perez* case, emphasizing this line in particular: the "focus of the analysis is not the kind of relief the plaintiff wants, but the kind of harm he wants relief from." *Perez v. Sturgis Public Schs.,* 3 F.4th 236, 241 (6th Cir. 2021).

This does not help Knox County. The "kind of harm she wants relief from" is the harm caused by others eating and chewing gum in her academic classes. Relief from *that harm* is delivered with a simple accommodation of requiring teachers to prohibit eating and chewing gum—i.e. like the math teacher, as with the school's

---

World Reports: *compare* https://www.usnews.com/education/best-high-schools/tennessee/districts/knox-county-schools/fulton-high-school-18042 *with* https://www.usnews.com/education/best-high-schools/tennessee/districts/knox-county-schools/l-n-stem-academy-145578.

expensive computer classrooms, and as in every *other* school in Knox County. None of those choices was accomplished by forcing students into "special education" with IEPs.

Knox County asks this Court to endorse the District Court's conflation of the IDEA with the ADA. That is, it relies upon the District Court's conclusion that Doe's lack of meaningful access broadly amounts to a "denial of a public education" which, in turn, implicates the IDEA. (R. 21, Response, p. 12). That is so wrong. Without rearguing Doe's initial brief, Doe emphasizes that a focus of "broadly speaking, educational," is *precisely* the reason the Sixth Circuit's decision in *Fry* was reversed. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 758 (2017) (explaining where the Sixth Circuit "went wrong" by being too broad). Simply, the District Court's analysis is pre-*Fry*, not post-*Fry*.[5]

[5] Judge Daughtrey's dissent was correct. "[W]hat *is* clear from the record—the complaint and attached exhibits—is that the request for a service dog would not modify Ehlena's IEP, because that request could be honored *simply by modifying the school policy allowing guide dogs to include service dogs.* That wholly reasonable accommodation – accomplished by a few keystrokes of a computer – would have saved months of wrangling between Ehlena's parents and the school district officials; it would have prevented her absen[ces] … and it would have mooted the question of exhaustion and eliminated the necessity of litigation that has ensued since this action was filed." *Fry v Napoleon Cmty. Sch. et al,* 788 F.3d 622, 634 (6th Cir. 2015) (Daughtrey, J., dissenting).

IV. THE CURRENT 504 PLAN LACKS THE ESSENTIAL ACCOMMODATION

Perhaps sensing this is clearly not an IDEA-FAPE case, Knox County devotes energy to a different point: that the 504 Plan *currently* in place is sufficient for Jane Doe. (R. 21, Response, p. 14). Obviously, it is not. It lacks the essential accommodation, a prohibition on eating and chewing in academic classes. And because *that* is lacking, Jane Doe experiences emotional, physical, and educational harm. While other accommodations are certainly helpful for persons with Misophonia, they are no substitute for the necessary environmental accommodation:

> Impairment in academic functioning caused by misophonia can be mitigated by **reasonable accommodations to the environment <u>and</u> (i.e., not instead of)** concurrent efforts to improve one's individual coping skills to manage the attentional (i.e. hypervigilance), emotional (i.e., anxiety, angher), physiological (i.e., increased autonomic nervous system functioning such as elevated heart rate), and behavioral (i.e., escape, avoidance, and/or confrontational behavior) components of this condition."

(D.E. 19-1, Dr. Rosenthal of Duke University, ¶9) (bold emphasis added; underline in original).

This is not new. That environmental accommodation, to prohibit eating and gum chewing, is the *accepted* accommodation for persons with Misophonia:

> The classroom setting provides unique challenges for youth patients with Misophonia. One cannot turn on music, escape the classroom, or use earplugs and also receive the classroom instruction. Where the specific trigger can be identified, such as eating or chewing gum, the school may create a forbiddance on eating or chewing in the academic setting (with tolerances for those having medical necessities). *If* chewing and eating in the academic setting is medically *necessary* for

> another student(s), then use of physical distancing, like a seating chart, may be attempted to meet both interests. Of course, care should be taken to ensure the Misophonia patient is not always placed in the back of a room, or corner, or isolated in a stigmatizing fashion.

(Declaration of Dr. Storch of Baylor College of Medicine, D.E. 2-2, ¶ 7, PageID# 36).

Last, Knox County argues that enforcing a prohibition on eating or gum chewing in academic classes impermissibly "impedes the rights of others." (R. 21, Response, p. 16). But there *is* no legal "right" to eat or chew gum in academic classes. If there were, the Math and Computer teachers would be in violation. And even if there were, it must yield where that action frustrates a person with a disability from accessing (or remaining in) the classroom.[6]

Even so, Knox County trumpets that "third party rights do not have to be sacrificed on the altar of reasonable accommodation." (R. 21, Response, p. 16-17) (citing *Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 492 (6th Cir. 2019) (quoting *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1046 (6th Cir. 2001)). However, that quote in *Davis* and *Groner* described a plaintiff with a mental illness who screamed all night; her request was for the apartment complex to evict the complaining neighbor as the "accommodation." *Id*. at 492. It was *in that context*,

---

[6] For example, a peanut-free environment "impedes" others (from eating peanut butter in the presence of a severely allergic student) but it is necessary to save those children from anaphylaxis. Or, some students may prefer walking up stairs, but replacing the stairs with a ramp does not deprive them of a "right."

"[w]e held that landlords need not breach their contracts with neighboring tenants on account of a handicapped person's needs." *Id*.

Knox County alludes to the COVID-masking-cases which required affirmative conduct (donning of masks) by all students. While there are some similarities to the masking cases, as well as substantial differences, both the Eastern District of Tennessee and this Sixth Circuit *rejected* the idea that asking assistance from third parties can never be an accommodation. This is particularly so where the accommodation has proved workable previously or has worked elsewhere. *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, at *4-5 (6th Cir. Dec. 20, 2021).[7]

Here, a ban on eating and chewing gum in limited classrooms clearly does work. "Spit it out," in Math class, is surely a refrain heard by every public-school

[7] "Finally, the Board argues that Plaintiffs' proposed accommodation is unreasonable because it impermissibly burdens the rights of third parties. *See, e.g., Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 492 (6th Cir. 2019) ("[A] third party's 'rights [do] not have to be sacrificed on the altar of reasonable accommodation.'" (second alteration in original) (quoting *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1046 (6th Cir. 2001)). We rejected a similar argument in *G.S.*, explaining that the subject schools had previously implemented a mask mandate and highlighting the absence of evidence that these measures were "impractical or impossible for schools to enforce." *G.S.*, 2021 U.S. App. LEXIS 34512, 2021 WL 5411218, at *3. Likewise, the record in this case "does not demonstrate that the Knox County Board of Education actually did experience any meaningful problems in response to [its prior] mask mandate." *S.B.*, 2021 U.S. Dist. LEXIS 195663, 2021 WL 4755619, at *20. The Board itself acknowledges that, since the district court issued its preliminary injunction in this case, "the number of students engaging in obvious non-compliance is less than 1% of the student population." *M.B.* at 4-5.

student, past and present. Schools do not want gum, or Doritos-crumbs, or wrappers, or stickiness, affecting their technology and equipment. So the "right" to eat and chew gum yields.

Yet Jane Doe needs protection too, not from the stickiness that damages equipment, but from the eating and smacking sounds that damage *her*. To say, as the District Court did, that her case cannot be heard because she must first receive an IEP for "specially designed instruction" is misplaced. She requires a simple *accommodation*. The District Court got the scope of coverage backwards. *E.g., Ja.B. v. Wilson Cty. Bd. of Educ.*, 2022 U.S. Dist. LEXIS 18783, at *7-8 (M.D. Tenn. Feb. 2, 2022) ("Accordingly, all students who qualify for special education under the IDEA are also protected by § 504, but not all students with disabilities under § 504 are eligible for special education under the IDEA.").

Because the balancing of the harms so greatly favors Jane Doe by delivering the accommodation, with no meaningful harm to Knox County at all, she requests this Court grant the preliminary injunction pending appeal and/or accelerate oral argument so that a ruling on this important matter may be received expeditiously.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i). As provided in Federal Rule of Appellate Procedure 27, the brief contains 2585 words. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s Justin S. Gilbert

CERTIFICATE OF SERVICE

I certify that the foregoing Motion has been filed via the Sixth Circuit Court's electronic filing procedures, including to defense counsel, Amanda Morse, on this 27th day of June, 2022.

/s Justin S. Gilbert